Filed 2/22/05 Unnamed Physician v. Enloe Medical Center CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

UNNAMED PHYSICIAN, Plaintiff and Appellant, v. ENLOE MEDICAL CENTER et al., Defendants and Respondents.	C045373 (Super. Ct. No. 128312)

The trial court denied petitioner's[1] petition for writ of administrative mandamus seeking to set aside Enloe Medical Center's (Enloe's) decision terminating petitioner's medical staff membership and privileges. Petitioner appeals the

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[1] We granted Enloe's motion to seal the record on appeal. To protect the identity of petitioner, we shall refer to him as unnamed physician or petitioner. Persons making complaints against petitioner shall be referred to by their initials.

judgment of the trial court on the grounds there was no substantial evidence to support Enloe's action against him and the procedure depriving him of staff privileges was unfair.

The trial court also awarded attorney fees to Enloe pursuant to Business and Professions Code section 809.9, which authorizes such an award where the suit is frivolous, unreasonable, without foundation, or in bad faith.[2] Petitioner argues the trial court abused its discretion in awarding such sanctions.

We shall affirm the judgment and the award of fees.

FACTUAL AND PROCEDURAL BACKGROUND

Enloe's bylaws prohibit harassment by a medical staff member against any individual, including any hospital employee or patient. The bylaws provide Enloe may take corrective action against any of its members whenever reliable information indicates the conduct of a member is, inter alia, detrimental to the quality of patient care or in violation of its bylaws. Corrective action for sexual harassment includes termination of medical staff privileges or membership.

Pursuant to this authority, and in response to a complaint by one of petitioner's patients, Enloe appointed an ad hoc committee to investigate this and other complaints of misconduct against petitioner. The ad hoc committee reported its findings

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[2] References to an undesignated section are to the Business and Professions Code.

to Enloe's Medical Executive Committee (MEC) on February 2, 2001. The ad hoc committee found there had been a history of concerns about petitioner's professional behavior both at Enloe and elsewhere. At the former Chico Community Hospital, petitioner was counseled by the chief of staff for "exhibiting anger at, and berating and belittling, nurses in the operating room; making inappropriate comments to nurses about their bodies and sexual matters; and physically abusing nurses and patients." Despite this counseling, there continued to be reports of misconduct against petitioner, leading to further admonishments in 1995 and 1996. As a result of this history and reports of patient abuse at Enloe, petitioner was formally reprimanded by the MEC at Enloe in August 1998 and required to be evaluated by a psychiatrist. He stipulated to a 14-day suspension of privileges and agreed to pursue a course of psychiatric treatment. Nevertheless, a new allegation against petitioner surfaced in March 1999.

The ad hoc committee found there were four recent, new allegations of misconduct against petitioner. The first was by patient L.N.B., who described sexual misconduct by petitioner while performing professional services as her plastic surgeon in July and August 2000. Enloe's chief of staff, Joseph Matthews, spoke with L.N.B., who gave him a handwritten statement she had prepared for submission to the Butte Glen Medical Society. The ad hoc committee also interviewed L.N.B.

L.N.B. made the following allegations against petitioner: (1) he asked intimate questions about her relationships with men; (2) he caused the insides of his thighs to come into contact with her knees while examining her for facial surgery; (3) he came to her home following surgery, helped remove her clothes, and left her lying in her bra and underwear for several hours; (4) he put his hand on her breast during a post-operative visit; (5) he flattered, hugged and kissed her during a post-operative visit;[3] (6) he commented that her screaming during the removal of surgical staples reminded him of his ex-fiancé during lovemaking; and (7) he exhibited anger against her and members of his office staff.

The ad hoc committee report stated the committee "had difficulty believing each and every aspect of L.N.B.'s story." Nevertheless, it found "L.N.B. is more credible, on the whole, than [petitioner]."

The second patient to accuse petitioner was K.J. K.J. filed a lawsuit against petitioner claiming he complimented, caressed, and kissed her while she was a patient. Another accuser, E.S., was a nurse in her husband's office. She stated that petitioner came in as a patient, and that while she was taking his blood pressure, he grabbed her upper arm, fondled and

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[3] Petitioner admits he hugs and kisses his patients, but claims this is "*de rigueur* for a cosmetic surgery practice" because "[i]t is what these type of patients want and what plastic surgeons do to help patients feel good about themselves."

squeezed her breast, and told her he could give her everything she wanted.

A final accusation came from one of petitioner's patients who refused to be identified. The patient, who was personally interviewed by one of the committee members, stated in September 1999, petitioner gave her a kiss on the mouth as she sat in his examining chair during a post-operative visit.

The ad hoc committee also searched local court records for petitioner's malpractice claims history. It found multiple lawsuits had been filed against him, and that he failed to disclose them in either of his last two applications for reappointment to the medical staff even though both applications called for such information.

The ad hoc committee described the allegations against petitioner to Bruce Kaldor, a psychiatrist who had previously evaluated petitioner. Dr. Kaldor opined that if the allegations were true, petitioner was "unfit to practice medicine" and "present[ed] a danger to public safety."

The ad hoc committee found the allegations against petitioner were substantially true, and agreed with Dr. Kaldor that petitioner was not fit to practice. It recommended petitioner's medical staff membership and clinical privileges be revoked.

The MEC convened a special meeting to discuss how to proceed and allowed petitioner to appear and make a statement and respond to questions. Following the meeting, at which

petitioner appeared, the MEC recommended to Enloe's Board of Trustees that petitioner's medical staff membership and clinical privileges be revoked.

Pursuant to Enloe's bylaws, a Medical Review Committee (MRC) was convened to hear petitioner's appeal from the MEC's recommendation. The MRC was composed of five members of Enloe's medical staff who, pursuant to the bylaws, gained "no direct financial benefit from the outcome," and did not act "as accuser, investigator, fact finder, initial decision maker, or otherwise . . . actively participate[] in the consideration of the matter leading up to the recommendation or action and who [were] not in direct economic competition with the member."

Petitioner was represented by an attorney at the hearing. The MEC appointed attorney Florence DiBenedetto as the hearing officer. Pursuant to the by-laws, the hearing officer was not an attorney "regularly utilized by the hospital, the medical staff, or the involved medical staff member . . . ." Additionally, the hearing officer could not gain any direct financial benefit from the outcome of the hearing.

After conducting voir dire of the hearing officer and the members of the MRC, petitioner's attorney stated there were no challenges to the officer or members of the committee.

The MRC hearing convened on May 22, 2001, and after 13 separate sessions, ended on November 27, 2001. The MRC members signed a written report and decision on December 19, 2001. The MRC found that petitioner had engaged "in sexual (i.e., unwanted

kissing and inappropriate touching) and other misconduct with patients and others and had made material misrepresentations or omissions on his reappointment applications." The MRC found the recommendation of termination reasonable and warranted.

Pursuant to the bylaws, the MEC re-convened to review the MRC report and decision. It voted unanimously to reaffirm its earlier decision to recommend to the Board of Trustees that petitioner's medical staff membership and clinical privileges be revoked.

Petitioner requested appellate review. The appeal board was comprised of three members of the Board of Trustees. Pursuant to Enloe's bylaws, only two grounds for appeal were permissible: substantial noncompliance with the procedures required by the bylaws or other applicable law resulting in prejudice, and insufficient evidence to support the decision. The appeal board addressed both of these issues and unanimously recommended petitioner's medical staff privileges be terminated. The Board of Trustees upheld the MEC's action, and it became final and effective on August 26, 2002.

Petitioner petitioned the superior court for a writ of administrative mandamus. The trial court granted an alternative writ and scheduled a hearing. The trial court found petitioner had received a fair procedure in the hospital hearings and that substantial evidence supported the decision to revoke petitioner's staff privileges. The trial court denied the writ, and further found petitioner's conduct in bringing the

litigation was "frivolous, unreasonable, and without foundation." Pursuant to section 809.9, the trial court awarded Enloe its reasonable attorney fees.[4]

DISCUSSION

I

Substantial Evidence

In reviewing the decision of a private hospital board, we review the administrative record to determine whether the board's decision is supported by substantial evidence in light of the entire record. (*Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1293; *Pick v. Santa Ana-Tustin Community Hospital* (1982) 130 Cal.App.3d 970, 980.) We do not weigh the evidence or judge the credibility of witnesses, but consider the evidence in the light most favorable to the prevailing party, resolving all conflicts in evidence in support of the judgment. (*Huang, supra,* at p. 1293.)

Upon a claim of insufficiency of the evidence, both this court and the trial court must determine whether the

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[4] Section 809.9 provides in pertinent part: "In any suit brought to challenge an action taken or a restriction imposed which is required to be reported pursuant to Section 805, the court shall, at the conclusion of the action, award to a substantially prevailing party the cost of the suit, including a reasonable attorney's fee, if the other party's conduct in bringing, defending, or litigating the suit was frivolous, unreasonable, without foundation, or in bad faith." Section 805 requires the head of any licensed health care facility to report to the relevant state licensing agency if a licensee's membership or staff privileges are terminated for disciplinary reasons. (§ 805, subd. (b).)

administrative decision was supported by substantial evidence, and the party claiming such insufficiency has the burden of setting forth all of the evidence. (*Foreman & Clark Corp v. Fallon* (1971) 3 Cal.3d 875, 881; *Pick v. Santa Ana-Tustin Comm. Hospital, supra*, 130 Cal.App.3d at p. 980, fn. 6.) The appellate brief must set forth all of the evidence introduced on the question involved. (*Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832; *Strutt v. Ontario Sav. & Loan Assn*. (1972) 28 Cal.App.3d 866, 874.) It is insufficient to cite only to the evidence that favors appellant. (*Gold v. Maxwell* (1959) 176 Cal.App.2d 213, 217.) Unless all of the material evidence on the question involved is set forth in appellant's brief, this court is entitled to treat the contention as waived. (*Oliver, supra,* 181 Cal.App.3d at p. 832; *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

Petitioner has not set forth all of Enloe's evidence in his brief. Petitioner's brief does not attempt to state the evidence favorable to Enloe or to draw inferences favorable to Enloe. He makes no attempt to fairly state all of the evidence.

One example of his slanted, subjective presentation of the evidence is the following:

> "Colo-Rectal Surgeon Joseph Matthews was Chief of Staff when the L.N.B. complaint surfaced in September 1999. Clearly he is the prime mover behind the subject proceedings against Morgan."

Petitioner gives two citations to the record for this statement. The first is a citation to his own points and authorities in

support of his petition where he claims Matthews was "plainly the prime mover behind these proceedings." This is argument, not evidence. The other citation is to the MEC's hearing exhibit 1-M. This contains Dr. Matthews' notes from: (1) a telephone conversation with L.N.B.'s psychologist; and (2) a meeting with L.N.B., her psychologist, and Dr. Nelson. These notes merely recount what was said during the conversations. There is no information in these notes from which we might infer Dr. Matthews was either the prime mover behind the charges against petitioner or was "out to get" petitioner, as his brief implies.

Petitioner states, "[h]e [Matthews] does not deny his bias against, if not personal animosity for his fellow surgeon [petitioner]." The citation petitioner gives to the record is to two portions of the reporter's transcript of the hearing. In the first part, Dr. Matthews was asked, "would it be fair to say that you have a decided bias against [petitioner] remaining on staff here at Enloe?" Dr. Matthews answered, "I am here to give [petitioner] his due process. I gave this information to the Medical Executive Committee. They made the decision. I don't even vote to make that decision. The revocation is what the Medical Executive Committee has given to the Board of Trustees. And part of the due process is to take this information and give it to [petitioner] and say, 'Do you want to allow the revocation of your privileges, or do you want a hearing?' He asked for the

hearing. It's my responsibility then to give this information to this body."

While it may be technically true that Dr. Matthews did not deny his bias against or animosity for petitioner, he certainly did not admit to any bias or animosity, as petitioner's statement of "facts" implies.

Petitioner's brief also claims as fact that "Matthews' agitated, arrogant and nervous demeanor, and argumentative, truculent and less-than-candid 'testimony,' bore out his lack of objectivity and unmistakable agenda." Petitioner's citation to the record for this "fact" is again to his own points and authorities in support of his petition, which, again, is not evidence.

Throughout petitioner's brief, he makes little or no attempt to set forth the evidence against him, and what evidence he does set forth is in an extremely abridged fashion and is peppered with slanted, unsubstantiated commentary and editorializing. Given this inadequate and substandard presentation of the argument that the findings are unsupported by substantial evidence, we may and do deem the argument waived. (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at pp. 881-882; *Oliver v. Board of Trustees, supra*, 181 Cal.App.3d at p. 832.)

In any event, petitioner's argument that his privileges may not be revoked solely based on hearsay evidence is meritless. The three cases petitioner cites for this proposition (*Walker v.*

City of San Gabriel (1942) 20 Cal.2d 879, 881; *Carl S. v. Commission for Teacher Preparation and Licensing* (1981) 126 Cal.App.3d 365, 369; *Martin v. State Personnel Board* (1972) 26 Cal.App.3d 573, 582-584) are inapposite because they involve administrative hearings of governmental agencies, not private hospital peer review proceedings.

The Legislature has delegated to the private sector the responsibility to provide fairly conducted peer review. (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 617.) In accordance with this directive, a private hospital's medical staff must adopt bylaws that include formal procedures for evaluating, inter alia, the termination of staff membership privileges. (*Ibid.*; § 809, subd. (a)(8).) These bylaws govern the parties' rights relevant to any administrative hearing. (*Ibid.*)

With respect to the admissibility of evidence at the hearing, Enloe's bylaws provide: "The general rule of evidence shall be that any relevant matter, whether written or oral, upon which responsible persons would be expected to rely in the conduct of serious affairs shall be admitted, regardless of its admissibility in a court of law." This standard of admissibility is appropriate for a private hospital peer review hearing. (*Oliver v. Board of Trustees, supra*, 181 Cal.App.3d at p. 834.) The bylaws do not exclude hearsay evidence, so long as the evidence is such that a responsible person would be expected to rely on it in the conduct of serious affairs.

Nor is hearsay evidence excluded by statute. Section 809.3, subdivision (a)(4), allows the parties to a peer review proceeding to present evidence "determined by the arbitrator or presiding officer to be relevant." No exclusion of relevant evidence based upon a hearsay objection is set forth. Government Code section 11513, subdivision (d), which provides that hearsay evidence "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions" is part of the Administrative Procedure Act, which applies only to state agencies, not to private hospital peer review procedures. (Gov. Code, §§ 11500, subd. (a), 11501, subd. (a).)

The appeal board had some concern about one piece of hearsay evidence -- the evidence concerning the female complainant who refused to give her name. Petitioner singles out this evidence in his brief. Notwithstanding its concerns, the appeal board found there was no demonstrable prejudice because there had been a series of incidents stretching over a 10 year period, and only one complainant had refused to be identified. We agree with the appeal board that even if petitioner's objections to the evidence regarding the unnamed complainant were valid, the admission of the evidence was not prejudicial.

Petitioner does not point to any other particular evidence as being unreliable in the conduct of serious affairs. His objections to the sufficiency of the evidence fail.

II
Fair Hearing

Petitioner argues he did not receive a fair hearing because: (1) Enloe distributed its evidence notebook to the hearing panel before he distributed his evidence notebook; (2) the panel was not instructed on the law or rules for evaluating evidence; (3) he was not given an adequate opportunity to sum up the testimony; and (4) the hearing officer was biased. These arguments have no merit.

The procedures a hospital employs in reaching staff membership decisions must be fair. (*Smith v. Vallejo General Hospital* (1985) 170 Cal.App.3d 450, 457.) The concepts of adequate notice and a reasonable opportunity to respond are central to the right of a fair procedure. However, the requirement of a fair procedure does not compel a formal proceeding with the embellishments of a court trial. (*Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 156; *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265-1266.)

a. *Evidence Notebook*

Petitioner does not explain how the early distribution of the MEC's evidence notebook unfairly prejudiced him, and cites no authority for the proposition that such an action rendered the hearing unfair. He raised this issue before the appeal board, which found neither the bylaws nor any other law make it improper to distribute exhibits without express instructions in advance of the hearing, and that such advance distribution is a

customary practice in these kinds of hearings. Additionally, petitioner agreed to the predistribution of the exhibits, and distributed his own exhibit binder in advance of the hearing. He had an opportunity to voir dire the MRC members to determine whether receiving the MEC binder first had biased them in favor of the MEC decision. They all stated they were not biased, and petitioner accepted the MRC panel members without objection. He cannot now claim the process was unfair because of the early distribution of the MEC binder.

b. *Lack of Instructions*

Petitioner claims the failure to instruct the MRC on the law or the rules for evaluating the evidence resulted in an unfair procedure. We disagree. As stated above, a peer review proceeding such as the one here need not entail all of the procedures of a formal trial. The bylaws did not require that instructions be given, nor does petitioner cite to any other law requiring such instructions. Petitioner did not object to the lack of instructions, and makes no attempt to specify how the lack of instructions unfairly prejudiced him.

c. *Opportunity for Closing Argument*

Petitioner complains he was given no warning that all evidence would be concluded on November 27, 2001, and that his oral summation would follow the conclusion of evidence and be limited to 30 minutes. This statement is highly misleading.

The hearings took place over a course of 13 separate sessions. The record indicates the parties were informed on

November 16, 2001, that closing arguments would take place on Monday, November 26, 2001. Petitioner cannot reasonably assert he was unprepared to present a closing argument because the hearings concluded a day later than expected. There is no competent evidence in the record that petitioner objected to the time or time limitations for closing argument.[5] The closing argument time and limitations applied to both parties. Petitioner makes no attempt to explain how the time or time limits for closing argument unfairly prejudiced him. Accordingly, there is no merit in this claim.

d. *Bias of the Hearing Officer*

Petitioner argues the hearing was not fair because the MRC deliberated in the presence of the hearing officer, who was appointed and paid by the MEC. This argument is also meritless.

Bias of the hearing officer cannot be implied, and the mere suggestion of bias is insufficient to show the procedure was unfair. (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1142; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 911.) There is nothing in the record to suggest the hearing officer was biased.

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[5] Petitioner states the decision on closing argument was enforced over protest. The citation he gives in support of this claim is to his own points and authorities in support of the writ petition. His points and authorities cite to a page in the reporter's transcript that contains no protest or objection regarding closing argument. This inadequate citation to evidence in the record is not an isolated incident.

Furthermore, petitioner had an opportunity to and did voir dire the hearing officer relevant to any bias. Petitioner specifically stated that he passed for cause and that he was "satisfied." The hearing officer, who was an attorney, stated she had done nothing with Enloe, and that this was her first engagement by Enloe in any capacity. She knew none of the panel members, none of the proposed witnesses, and did not know petitioner. She was compensated for the hearing on an hourly basis. These facts do not suggest bias.

Petitioner has failed to show any unfairness in the procedure.

III
Attorney Fees

Petitioner claims the trial court's award of attorney fees to Enloe was an abuse of discretion. We disagree.

Enloe's answer to the petition for writ of mandate requested attorney fees pursuant to section 809.9. That section provides a court may award reasonable attorney fees to the prevailing party where "the other party's conduct in bringing, defending, or litigating the suit was frivolous, unreasonable, without foundation, or in bad faith." The judgment concluded petitioner's "conduct in bringing and litigating this dispute was frivolous, unreasonable, and without foundation."

Petitioner implies Enloe's claim for fees must fail because it was merely claimed in the answer by way of the prayer, rather than by an affirmative defense. He cites four cases in support of his argument (*Walsh v. West Valley Mission Community College*

Dist. (1998) 66 Cal.App.4th 1532, 1546; *Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, 1474; *California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442; *T.E.D. Bearing Co. v. Walter E. Heller & Co.* (1974) 38 Cal.App.3d 59, 61, 63), none of which stand for the proposition that a defendant's claim for attorney fees is new matter that must be pled by way of affirmative defense. The new matter which is required to be alleged in an affirmative defense consists of facts which, if proven, will destroy the right of action and defeat recovery. (*Walsh v. West Valley Mission Community College District, supra*, 66 Cal.App.4th at p. 1546.) A defendant's request for attorney fees is not an affirmative defense for the simple reason that it is not a defense. It was proper for Enloe to request attorney fees in its prayer. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2003) ¶ 6:485-6:486, p. 6-99-6-100.)

Citing *Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1485-1487, petitioner argues there was no basis for concluding his petition was frivolous. In *Mir, supra*, at page 1483, the court held that "[a] finding of insufficient evidence is not tantamount to an *affirmative* finding the Hospital's conduct in resisting mandamus was unreasonable or without foundation." The court did not specifically hold that attorney fees were unavailable under section 809.9 for actions that are merely unreasonable or without foundation. However, despite the plain language of the statute, the court held

section 809.9 was intended as a sanctions statute, implying the Legislature only intended attorney fees to be awarded where the prosecution or defense of the case was frivolous or in bad faith. (*Mir, supra*, at p. 1494 (dis. opn. of Croskey.).)

Without resolving whether a litigant's actions must be frivolous or in bad faith to warrant an award of attorney fees under section 809.9, we conclude petitioner's petition was frivolous. The term "frivolous" when used to describe appeals means that "'any reasonable attorney would agree that the appeal is totally and completely without merit.' [Citations.]" (*Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 457.) Applying the same standard to petitioner's petition, we agree with the trial court that it was frivolous.

Petitioner's points and authorities in support of his petition argued without authority that the trial court should not subject Enloe's decision to revoke his staff privileges to substantial evidence review, but to a strict scrutiny review. He urged this more rigorous review because he claimed Enloe is a monopoly. This is a frivolous argument without any basis in authority or fact.[6]

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[6] Petitioner's request for judicial notice of the internet sites of Enloe, Oroville Hospital, Chico Chamber of Commerce, and California Emergency Medical Services Authority is denied. Matters to be judicially noticed must be relevant (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578), and Enloe's position as the only hospital in Chico or the major employer in the City of Chico has no relevance to the standard of review the trial court or this court employs in reviewing a hospital's decision in a peer review proceeding.

Petitioner also argued below that he was deprived of due process because Enloe simply did not approve of his personality or style. Petitioner's argument completely ignores the serious charges of sexual misconduct against him.

Petitioner's points and authorities in support of his petition contained grossly misleading characterizations of the evidence at the hearing. For example, he claimed Dr. Matthews admitted petitioner was "being booted because he [petitioner] did not live up to Matthews' own normative unwritten belief and standards." Petitioner provided no citation to the record for this statement. Petitioner also stated that the more he tried to explain "that his motive was caring and friendship, not sexual, the angrier Matthews got." This statement cited to a portion of the hearing transcript that in no way indicated Dr. Matthews became angry when petitioner tried to explain his motives.

Petitioner claimed Dr. Matthews said any touching or kissing of a patient by petitioner constituted sexual relations, while the same thing by Dr. Matthews would be merely endearment, friendship, or love. The citation to the record for this statement contained a passage where Dr. Matthews explained he would consider any touching of the patient's body with which the patient was uncomfortable to be a sexual relationship in the doctor-patient context. He stated he thought it was "provocative" that petitioner told a patient he would give her information if she would kiss him on the cheek. He was asked if

he ever kissed his son or daughter, and whether that was sexual. He stated he did not think it was sexual because they were his children and it was a form of love. He stated he had kissed other people as a form of love or endearment, but not in a sexual manner. However, he did not state he kissed patients as a form of love and endearment. Dr. Matthews' testimony cannot be construed, as petitioner implies, as holding petitioner to a standard he himself violated.

Petitioner made the same substantial evidence argument below that he raises here. As on appeal, petitioner's presentation of the evidence below was extremely one-sided. Two entire pages of his "Statement of Facts" were devoted exclusively to singing his own praises. In relating L.N.B.'s complaints against him, he made a brief reference to the actual charges by way of a footnote, while the body of the discussion of L.N.B.'s charges consisted of editorial comments about her unreliability and an in-depth discussion of his own evidence countering the L.N.B. complaint.

Petitioner's recounting of the other charges against him were similarly deficient. His points and authorities primarily contained his own editorializing on the evidence in an attempt to discredit the charges, relegating the actual facts of the claims against him to a footnote, when he bothered to relate the facts at all.

Despite having been informed at the hearing of the rules of evidence in this type of proceeding, petitioner continued to

argue Enloe could not base its decision on hearsay. Petitioner's only authority for such a proposition consisted, as it does on appeal, of cases involving administrative hearings of government administrative agencies, rather than private hospital peer review proceedings.

Petitioner's argument below that he did not receive a fair hearing consisted of statements that Dr. Matthews, the MEC, and the MRC were biased against him. He cited to no evidence to support this claim. As on appeal, he argued below that the MRC was given no instructions, but cited to no authority that any instructions were required.

Petitioner also argued his hearing was unfair because the hearing officer and hearing panel were all picked by Enloe. It is "well established" that a party is not denied a fair hearing because an administrative entity performs as both the prosecutor and judge. (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Center*, *supra*, 62 Cal.App.4th at p. 1142.) Moreover, petitioner presented no evidence of bias, and bias may never be assumed in such proceedings. (*Ibid*.)

Although the trial court did not specifically explain why it found petitioner's conduct to be frivolous, unreasonable and without foundation", it stated that with regard to petitioner's substantial evidence argument, "Petitioner has waived his position that the findings are not supported by substantial evidence by his failure to correctly construct his arguments

utilizing the evidence presented to Respondents, and the proper application of the law to that evidence."

Petitioner had already raised the claims contained in his petition in an administrative appeal before the appeal board. The appeal board found his claims to be meritless. The arguments petitioner made below were unsupported by objective fact or applicable law, and petitioner's memorandum of points and authorities in support of his petition was misleading and filled with bluster, unsubstantiated editorializing on the facts, and puffery, indicating an attempt to mask the petition's lack of merit. We conclude the petition was totally and completely without merit, that any reasonable attorney would have found it so, and the trial court did not abuse its discretion in awarding attorney fees.

Petitioner argues the amount of the award was excessive. However, this court will not set aside an award of attorney fees absent a showing that the amount was manifestly excessive under the circumstances. (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 782.) Petitioner has made no such showing.

IV
Attorney Fees on Appeal

Enloe's brief requests attorney fees pursuant to section 809.9. It is settled that where a statute authorizes an award of attorney fees in a lower tribunal, it also authorizes attorney fees incurred on appeal. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.)

Petitioner's appeal is largely a repeat of his petition and supporting arguments below. For the same reasons Enloe was properly awarded attorney fees pursuant to section 809.9 for the trial court judgment in its favor, Enloe is entitled to its attorney fees on appeal. We shall award Enloe its attorney fees on appeal, but remand to the trial court for a determination of the amount of such fees. (*See Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)

DISPOSITION

The judgment is affirmed with directions to the trial court to determine the amount of attorney fees to be awarded to Enloe for legal services rendered on this appeal.

BLEASE, Acting P. J.

We concur:

SIMS, J.

RAYE, J.